

The Origins and Effectiveness of the Geneva Conventions for the Protection of War Victims

by Ian Harding

It gives us pleasure to publish extracts from a remarkable unpublished work by an Australian author, Ian Harding. In four chapters (Antiquity, Islam, Some European Developments, Henry Dunant) it covers the origins of the Geneva Conventions from ancient civilizations, and then goes on to explain their significance in international law and action (The Conventions, The Propositions, The Conclusions). The passages we quote below deal with the history of humanitarian ideas and the laborious efforts, repeated time and time again throughout the centuries, for the ever more effective protection of human dignity. (Ed.).

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Before considering further the emergence of early societies, in particular that entity which the Greeks termed *polis*, inadequately rendered into English as “city-state”, with the associated development of war and diplomacy and laws regulatory of both, it may be convenient to note briefly the “recent origins” theory of the development of the laws of war which appears to have wide acceptance amongst learned and authoritative Western writers on international law.

The Western view was well expressed by Sir Hersch Lauterpacht in his statement “the roots of the present laws of war are to be

traced back to practices of belligerents which arose . . . during the latter part of the Middle Ages".¹ A similar outlook is indicated by Georg Schwarzenberger when he attributes development of the rules regulating warfare to the teachings of Christianity, the writings of medieval moralists and Renaissance humanists and considerations of chivalry.² Similarly Nussbaum, in his generally admirable "Concise History" makes what is, by implication, a rather shattering assertion in the preface to the revised edition of his work—"The question as to whether the Spaniards of the sixteenth century or Grotius really initiated international law . . . has been accorded closer scrutiny". This rather unfortuitous statement not only appears to ignore the quite elaborate body of international law which developed in pre-Christian times, but the extensive and regulated relationships which arose between Moslem and Christian Powers of which the voluminous diplomatic correspondence in the period c.800 A.D. between Charlemagne, Caliph Haroun al-Raschid of Baghdad, the Byzantine Emperor, the Caliph of Cordoba and Offa, King of Mercia, is but one illustration.

In fact, of course, Dean Nussbaum is also ignoring a very great deal of the valuable information adduced in his own "Concise History". For example, the comment in his preface referred to above is followed within a few pages by references to the celebrated treaty between Lagash and Umma of c.3100 B.C., to the Hittite-Egyptian treaty of 1269 B.C., to rules of war cited in Deuteronomy and to the treaty system operating between the States of Ancient Greece, in respect of which he makes the pertinent remark "such an elaborate treaty system did not appear in the international sphere (he could more properly have said "re-appear") until the nineteenth century".³

The comprehensive work of Grotius and the Spanish Scholastics suffers no diminution by acknowledgement of earlier sources. They did not claim to be innovators—Grotius went to great lengths to give his work the appearance of resting on classical foundations, though this may well have been merely a persuasive device.

¹ H. Lauterpacht, *Oppenheim's International Law*, Vol. II (7th Ed.) (1952) at p. 226.

² G. Schwarzenberger, *A Manual of International Law*, Vol. 1 (1960).

³ A. Nussbaum, *A Concise History of the Law of Nations* (1953 revised edition), Preface and at pp. 1, 2, 3, 5 *et seq.*

Finally, to round off this very brief survey of the views of some distinguished writers, a comment by Julius Stone is worthy of note—"for practical purposes the modern system of international law has its beginnings in the late medieval period".⁴ Professor Stone's assertion is qualified by the specific allusion to modern international law, but perhaps it may be demonstrated that rules frequently regarded as modern are in fact veritable antiques.

In justice to Professors Stone and Schwarzenberger and to the late Sir Hersch Lauterpacht, it is proper to point out that their comments are made in works which are primarily dealing with contemporary international law and which do not purport to be historical except in so far as is necessary to clarify the subject matter. As far as Dean Nussbaum's work is concerned, the statement quoted above is quite substantially off-set by the facts which he himself has gathered and expounded. Nevertheless, an impression of slight "Western-Christian recent origins" complacency is conveyed.

With respect to the authorities quoted, it is considered that the "recent origins" theory is too limited, and that the roots of the present laws of war, including the Geneva Conventions, lie very much deeper than the late Middle Ages. In short, the laws of war are as old an institution as war itself. An opinion expressed by Ilmar Tammelo on this point is particularly pertinent. "It has indeed been widely assumed that in its early development international law was a law of Western 'civilised' nations, that is, of European Christendom. This view appears to be based on a civilisational bias . . .". Dr. Tammelo continues by pointing out the debt owed by Vitoria, Suarez and Grotius to Arab and Jewish philosophers and adds "moreover, the philosophy and *episteme* of Ancient Greece, which so prominently influenced the beginnings of modern international legal scholarship, are certainly continuous with the earlier civilisations of Egypt and Asia Minor, and possibly even of Ancient India".⁵

Dr. Tammelo has thus stressed neatly two important points. Firstly that Grotius and the Spanish Scholastics did not live and

⁴ J. Stone, *Legal Controls of International Conflict* (1954) at p. 3.

⁵ I. Tammelo, "The Law of Nations and the Rhetorical Tradition of Legal Reasoning" in the *Indian Year Book of International Affairs* (1964) pp. 227, 229 *et seq.*

work in a Christian European vacuum—with the Moslem conquerors of Spain not finally expelled until 1492, Moslem maritime control of the Mediterranean not broken until 1571 and the Turkish siege of Vienna only relieved in 1683, it was of course impossible for them to have been uninfluenced by the laws and philosophy of Islam which in themselves contained much of Judaism, early Christian teachings and Greek philosophy. Secondly, Dr. Tammelo has pointed to the path leading back from Ancient Greece to Asia Minor, Egypt and India. Today, with our greater knowledge of the Hittite Empire of the Anatolian Plateau and of the colonizing habits of the Mycenaean Greeks in both littoral Asia Minor and Crete, we are perhaps able to see something of this path in a little more detail and to have a better understanding of the “ sudden ” flowering of Greek civilization without which our vaunted Western civilization would never have come into being.

For thousands of years “ international ” wars—as distinct from internal disturbances, palace revolutions and the like—have tended to fall into two main classes: clashes between permanent settlements which, in the process of expansion, have met at the fringes, and the almost ceaseless series of collisions between nomadic graziers and food-gatherers, ever in transit in search of fresh pastures, and the food-raising inhabitants of permanent settlements. In relation to this latter type of conflict, General Fuller has said “ Thus arose two ways of life, the settled and the wandering, and throughout history they have been in opposition ”.⁶ Equally, of course, the permanent settlements, whether as city-states, nations or empires, have also been in opposition with each other throughout history.

As regards conflicts between early permanent settlements such as the Sumerian city-states, it is reasonable to assume that there was a fairly rapid and substantially mutual development of rules of war and diplomacy. If there was to be contact there had to be rules so that those meeting did not have to live in constant fear of a spear in the back. From early contacts between civilized communities such generally recognized laws as immunity of heralds, ultimatum and declaration prior to war, and formal peace treaty

⁶ J. F. C. Fuller, *The Decisive Battles of the Western World*, Vol. I (1954) at p. 2.

(such as that referred to between Umma and Lagash in c.3100 B.C., conveniently inscribed on a border-marker) came into being.

The position in respect of clashes between nomads and settlers was naturally very different. Without permanent settlements, the nomads had no need to acquire sophisticated administrative structures and their accompanying rules, and in the main their wars were carried on without the benefit of preliminary or terminal diplomacy or any particular rules of conduct other than *vae victis* . . .

. . . From 2000 B.C. forward the position becomes very different. Larger Mesopotamian political units emerged, diplomatic intercourse between States intensified, serious attempts were made to formulate and record coherent systems of law and, in Cottrell's words, between 2000 and 1500 the Egyptian, Mesopotamian and Cretan civilizations "began to meet at the fringes".⁷ Cottrell could also have mentioned that Hittite civilization and one particular Mesopotamian power—Babylon—also had a fringe-meeting in this period (c.1595) with disastrous consequences for the Babylonian dynasty established by Hammurabi. Fortunately, the destruction of Hammurabi's dynasty did not also involve the loss of his celebrated legal Code (c.1800 B.C.) with its incipient provisions relating to the ransoming of hostages, a branch of the laws of war which was not to be developed fully until the coming of Islam . . .

. . . An obvious and direct consequence of Hittite military prowess was contact and conflict with neighbours and expansion of empire. The really significant feature of the Hittite achievement was, however, that unlike some of their warlike contemporaries—most notably the Assyrians—their conduct of warfare and treatment of conquered foes was outstandingly humane. Cottrell considers them the most humane of the early civilizations of Asia Minor⁸ and his view is well borne out by O. R. Gurney . . .

. . . The foregoing may be summarized by the conclusion that the Hittite municipal legal system was humane and advanced in both the letter of the law and its application. Turning to the laws of

⁷ L. Cottrell, *The Anvil of Civilization* (1951), at p. 103.

⁸ L. Cottrell, *Lost Cities* (1959), at p. 208.

war, it may be seen that, ultimately, similar principles were applied in international relations. Originally, as Gurney has remarked, the Hittite kings needed no apology for conquest and plunder,⁹ but later a formal process of ultimatum, rejection and declaration of war was adopted as standard procedure, and termination of hostilities was marked by a peace-treaty. The reason for the declaration of war was carefully explained—a procedure which was to be specified by Grotius and in the ultimate embodied in the Hague Regulations of 1907.¹⁰

Apart from this extremely ‘modern’ diplomatic procedure relative to commencement and conclusion of hostilities, the most outstanding and enlightened Hittite rules of war related to treatment of the vanquished. During a conflict they were always ready to consider a negotiated settlement, thus anticipating Grotius’ maxim “In war peace should always be kept in view”,¹¹ and their treatment of captured cities usually did not involve sacking or razing—an attitude which would have been both understood and approved by Alexander of Isius who, according to Polybius, was highly critical of Philip V of Macedon for destroying towns which were the objects of contention in war, instead of fighting in the open and leaving the towns intact.¹² As is not unusual in wars both modern and ancient, treatment of the conquered depended to an extent on the nature of the defence offered. Prudent foes who made an early surrender were usually permitted to swear fealty and were otherwise unmolested. Everyone from ruler down was allowed to retain their position provided that a suitable peace treaty was duly executed. In the Hittite phrase, the vanquished were merely “subjected in their place”. Those who offered a tenacious resistance were sometimes treated more harshly, but even in extreme cases where captured cities were razed and the inhabitants transplanted as serfs, they were not otherwise ill-treated. Gurney comments “there is a complete absence of that lust for torture and cruelty which characterizes the annals of the Assyrian kings in their

⁹ O. R. Gurney, *The Hittites* (1962), at p. 113.

¹⁰ See Article 1 of Convention III of 1907.

¹¹ H. Grotius, *De Jure Belli ac Pacis* (1646), Book III (F. N. Kelsey trans. 1925) ch. XXV at p. 860.

¹² A. J. Toynbee, *Greek Civilization and Character* (1953) at p. 68.

victories".¹³ (Gurney is obviously alluding to the well-documented passion of victorious Assyrian rulers for the impalement and flaying alive of their captives. After flaying they usually decorated the walls with the skins. It is significant that Assyrian ascendancy was largely in a period of Hittite and Egyptian decline, but though Assyria had contact with both Powers, it was quite uninfluenced by their humanitarian concepts). The Hittite peace-treaties were just as carefully phrased as were their ultimata and declarations of war . . .

. . . It has been endeavoured to make the preceding propositions and their illustrations, though obviously in no way exhaustive, speak for themselves within the limits imposed by the arbitrariness of their selection. These conclusions will in consequence be brief.

The broad picture which emerges is clear enough. It is one of an intense, continuous and widespread struggle by those striving to preserve human life and dignity and to diminish suffering against all the forces and events which seek to deny those values. In essence, it is part of the eternal conflict between life and death, but with a variation to the extent that where death is not to be denied it is sought to soften its impact, to make it come a little more gently. The most remarkable thing about this struggle is not the frequent triumph of the forces of disaster but the surprising successes of those seeking to mitigate suffering. Cruelty, hatred and contempt are not always the victors. Humanitarianism aided by its one imperishable weapon, hope, has its achievements as well as its failures . . .

. . . The struggle, which is Pasteur's struggle, between those seeking to destroy life and those striving to preserve it, between his law of blood and death and his law of peace, work and salvation, must and will go on. Those who espouse the humanitarian cause can neither deviate from their paths nor lay aside their burdens, however onerous they may become. They would, however, be not ungrateful for the assistance of those as yet uncommitted to the struggle who have still to appreciate its urgency. Charity may

¹³ O. R. Gurney, *op. cit.*, at p. 115.

indeed be an unextinguishable human impulse, but it is now more important that humanitarianism triumph universally than that it merely remain undefeated. The Geneva Conventions, as well as the other humanitarian laws, can be made fully effective and, if humanity is to survive, this objective must be achieved.

It is appropriate to conclude with the motto of the International Committee of the Red Cross: *Inter Arma Caritas*.

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